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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MELVIN WISHUM, JR., Defendant and Appellant.	B236614 (Los Angeles County Super. Ct. No. NA089258)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur Jean, Judge. Affirmed.

Lynne S. Coffin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Chung L. Mar and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Melvin Wishum, Jr., was found guilty by a jury of sale of marijuana in violation of Health and Safety Code section 11360, subdivision (a). The trial court found that defendant had served a prior prison term as defined in Penal Code section 667.5, subdivision (b).[1] Defendant was sentenced to state prison for four years, consisting of the midterm of three years for the charged offense and one year for the prior prison term.

Defendant argues in this timely appeal that the trial court erred in refusing to grant his motion for a continuance in order to retain counsel of choice, a structural error requiring reversal. Defendant further argues the Equal Protection Clauses of the federal and state Constitutions require that he receive the benefit of the realignment of California's sentencing scheme although he was sentenced prior to the effective date of the new statute. We reject both arguments and affirm.

FACTS

Because the sufficiency of the evidence is not challenged on appeal and no evidentiary issues are raised, we briefly state the facts in the light most favorable to the judgment. Ron Earley works for the Long Beach Police Department, buying drugs. He is paid $60 when he makes a purchase, and $20 when he is unsuccessful.

On June 16, 2011, Earley was working under the supervision of Detective Aldo Decarvalho. He was searched for money and drugs, and then provided $20 to purchase drugs from a group of individuals, including defendant. Using street vernacular, Earley asked to purchase $20 of marijuana. Defendant left the group and returned with a white bag containing marijuana. Officers in the area saw varying portions of the transaction. Defendant was taken into custody by patrol officers. Earley identified defendant in a field showup of suspects. The $20 bill used for the purchase was not recovered on defendant or others detained with him, nor did he possess any marijuana.

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[1] Statutory references are to the Penal Code except where otherwise indicated.

DISCUSSION

Denial of Motion to Continue the Trial

Defendant's first contention involves the trial court's refusal to continue trial as the jury was being summoned to the courtroom. Defendant argues the denial of a continuance for the purpose of retained private counsel constituted structural error requiring reversal.

A. *Background*

Defendant appeared in the trial court on August 19, 2011.[2] The public defender declared a conflict of interest, and the alternate public defender was appointed. A motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 was granted on that date, subject to an in camera hearing set for August 26. The trial date of September 22 remained in place, with the trial court's observation that "this is a standard case that you can prepare for in about 20 minutes."

Following the in camera hearing on the *Pitchess* motion on August 26, the trial court ordered disclosure of one report with respect to one officer, with compliance on August 30.

On September 22, the date of trial, defendant personally addressed the trial court, stating that "[a]t the moment I am not prepared for this case. I had things going where my mother and father were going to help me get a lawyer and my brother passed away. And that kind of slowed things down. Right now, things are not looking in my favor. I was going to ask to please get myself a lawyer." The trial court responded, "No. We are going to go to trial today. This is an easy case. You win, you lose, it is not a difficult case. [¶] You have a fine lawyer here. You have a fine prosecutor, too."

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[2] All relevant dates are in 2011, unless otherwise stated.

The trial court advised defendant "this is a two-year case." If defendant wanted to enter a plea, the court offered to put off sentencing until after October 1, which would result in a two-year sentence to county jail with "no probation or parole afterwards" due to realignment of the criminal justice system. The court observed "that nobody knows how long the sheriff will keep you." If defendant were to go to trial and be "convicted in the next day or two, it is a prison sentence and you will have a parole tail."

Defendant asked for time to "talk it over with my family and my girl[.]" The trial court said there was time for defendant to discuss it because the jury would "be down in about half an hour." The motion to continue the trial was denied.

After discussion, defense counsel informed the trial court that defendant would like to accept the proposed case settlement. The trial court began taking the plea, answering several questions for defendant in the process. When asked how he plead, defendant stated, "I changed my mind, Your Honor. I would like to go to trial." Defendant was thereafter convicted by a jury.

B. *Standard of Review and Relevant Law*

The trial court has broad discretion on matters of continuances and reversal is appropriate only where denial of a continuance is arbitrary and unreasonable. (*People v. Alexander* (2010) 49 Cal.4th 846, 934-935.) "Section 1050 sets out the procedure for granting continuances in criminal cases." (*People v. Superior Court* (*Brim*) (2011) 193 Cal.App.4th 989, 992.)

Under section 1050, subdivision (a), it is the duty of the trial court "to expedite these proceedings to the greatest degree that is consistent with the ends of justice." "To continue any hearing in a criminal proceeding, including the trial, (1) a written notice shall be filed and served on all parties to the proceeding at least two court days before the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary . . . ." (*Id.*, subd. (b).) "Notwithstanding subdivision (b), a party may make a motion for a continuance without complying with the

requirements of that subdivision." (*Id.*, subd. (c).) "When a party makes a motion for a continuance without complying with the requirements of subdivision (b), the court shall hold a hearing on whether there is good cause for the failure to comply with those requirements. At the conclusion of the hearing, the court shall make a finding whether good cause has been shown and, if it finds that there is good cause, shall state on the record the facts proved that justify its finding. A statement of the finding and a statement of facts proved shall be entered in the minutes. If the moving party is unable to show good cause for the failure to give notice, the motion for continuance shall not be granted." (*Id.*, subd. (d).) "Continuances shall be granted only upon a showing of good cause. Neither the convenience of the parties nor a stipulation of the parties is in and of itself good cause." (*Id.*, subd. (e).)

C. *Analysis*

The trial court did not abuse its discretion in denying the motion to continue. The motion was made on the day of trial, without the notice required by section 1050, subdivision (b). No good cause was presented for the delay in making the motion. A jury panel had been summoned to the court at the time of the request to continue. Defendant made no attempt to demonstrate that any diligence had been exercised in seeking private counsel. The motion was open ended, with no particular date for either the retention of private counsel or readiness for trial. The court was not required, as a matter of law, to grant a continuance under these circumstances.

Defendant's attempt to treat the trial court's action as structural error requiring reversal is unavailing. "As to defendant's request for a continuance to seek private counsel, the court's decision to deny the request is reviewed as an abuse of discretion. (*People v. Blake* (1980) 105 Cal.App.3d 619, 624.) . . . However, he waited until the last minute to express these concerns. There is no evidence defendant attempted to retain counsel, or had even taken steps to secure funds to hire private counsel, although his problems with appointed counsel apparently began before November 2. Under the

circumstances of this case, the court's decision to deny the request for continuance to obtain counsel does not constitute an abuse of discretion or a denial of his Sixth Amendment right to counsel. (See *People v. Courts* (1985) 37 Cal.3d 784, 790–791.)" (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1367-1368.)

Defendant's reliance on *U.S. v. Gonzalez-Lopez* (2006) 548 U.S. 140 (*Gonzalez-Lopez*) is misplaced. In *Gonzalez-Lopez* , the defendant retained counsel, Joseph Low, but the trial court rejected Low's application to appear *pro hac vice* on the ground that Low had violated a court rule during a hearing in a separate matter. The court took steps to prevent Low from communicating with the defendant during trial, in which the defendant was represented by another attorney. The Supreme Court held the trial court's action violated the defendant's Sixth Amendment right to counsel of choice. (*Id.* at pp. 142-143, 146.)

"The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.' We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. [Citations.]" (*Gonzalez-Lopez, supra,* 548 U.S. at p. 144.) The erroneous deprivation of the right to counsel of choice is structural error requiring reversal. (*Id.* at p. 150.) "We have recognized a trial court's wide latitude in balancing the right to counsel . . . against the demands of its calendar, *Morris v. Slappy,* 461 U.S. 1, 11–12 (1983)." (*Id.* at p. 152.)

Gonzalez-Lopez is readily distinguished from the instant case, because defendant had no retained counsel. He did not suggest the name of potential counsel, nor did he indicate any effort had been made to locate counsel. The jury panel was on its way to the trial court. The difference between improperly removing retained counsel in *Gonzalez-Lopez,* and precluding communication with him, and what happened on the eve of defendant's trial is readily apparent.

Equal Protection

Defendant was sentenced to state prison on September 23, 2011. Effective for sentencing hearings taking place on or after October 1, 2011, the Legislature enacted a realignment of California's sentencing scheme, eliminating state prison as a sentencing option for some felony offenses (including defendant's) and providing for alternative sentencing plans at the county level. Defendant contends he is entitled to the benefits of the new statute as a matter of equal protection of law. Defendant argues the failure to apply the statute to him results in impermissible disparate treatment of two similarly situated groups of defendants—those who were sentenced before and after the effective date of the statute. Realizing the statute on its face applies prospectively, defendant limits his challenge to equal protection grounds.

This issue was addressed by our colleagues in the Fifth District in *People v. Cruz* (2012) 207 Cal.App.4th 664 (*Cruz*) and resolved adversely to defendant's position. (Accord, *People v. Lynch* (Sept. 13, 2012, C068476) ___ Cal.App.4th __ [2012 DAR 12945] (*Lynch*).) We agree with the analysis in *Cruz*.

"On April 4, 2011, the Governor approved the '2011 Realignment Legislation addressing public safety' (Stats. 2011, ch. 15, § 1) which, together with subsequent related legislation, significantly changed the sentencing and supervision of persons convicted of felony offenses. The sentencing changes made by the Act apply, by its express terms, 'prospectively to any person sentenced on or after October 1, 2011.' (Pen. Code, § 1170, subd. (h)(6).) The question raised on appeal is whether a defendant, who was sentenced before October 1, 2011, but whose conviction is not yet final on appeal, is entitled to be resentenced under the Act's provisions, specifically subdivision (h) of section 1170. We conclude the answer is no. The sentencing changes made by the Act apply only to persons sentenced on or after October 1, 2011, and such prospective-only application does not violate equal protection." (*Cruz, supra,* 207 Cal.App.4th at p. 668, fns. omitted.)

The defendant in *Cruz* contended "that denying him the benefits of the Act violates his right to equal protection under the federal and state Constitutions. By creating two classes of inmates—those sentenced before October 1, 2011, whose sentences are served in state prison and who are subject to some form of parole, and those sentenced on or after October 1, 2011, whose sentences (or some portion thereof) are served in county jail and who are not subject to parole—the Act, he says, treats two similarly situated groups in an unequal manner. In [Cruz's] view, no compelling state interest justifies this disparity in treatment." (*Cruz, supra,* 207 Cal.App.4th at p. 674.) This contention is indistinguishable from that presented here by defendant.

Adopting the rational basis level of analysis of equal protection claims, as opposed to the strict scrutiny or important governmental interest tests, the *Cruz* court found no equal protection violation in prospective application of the amended sentencing statutes. "In our view, the sentencing changes created by section 1170, subdivision (h) do not directly affect a defendant's fundamental interest in liberty. His or her statutorily prescribed sentence is no greater under the law as it existed prior to the Act's operative date than under the Act's provisions. (See *In re Stinnette* [(1979)] 94 Cal.App.3d [800,] 805, fn. 4; cf. *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 502-503.) We do not believe he or she has a protectable interest in serving that sentence in county jail as opposed to state prison. (Cf. *Meachum v. Fano* (1976) 427 U.S. 215, 225 [14th Amend. liberty interest not implicated when prisoner transferred from one institution to another with more severe rules].) Similarly, he or she has no fundamental interest in the possibility of a conditional early release via a hybrid sentence. (Cf. *Greenholtz v. Nebraska Penal Inamtes* (1979) 442 U.S. 1, 7 [no constitutional or inherent right of convicted person to be conditionally released before expiration of valid sentence], abrogated on another ground as stated in *Wilkinson v. Austin* (2005) 545 U.S. 209, 229; *People v. Wilkinson* [(2004)] 33 Cal.4th [821,] 838 [defendant does not have fundamental interest in specific term of imprisonment]; *People v. Edwards* [(1991)] 235 Cal.App.3d [1700,] 1706 [equal protection challenges based on statutory ineligibility for diversion are

reviewed under rational basis standard].)" (*Cruz, supra*, 207 Cal.App.4th at pp. 677-678.)

"The distinction drawn by section 1170, subdivision (h)(6), between felony offenders sentenced before, and those sentenced on or after, October 1, 2011, does not violate equal protection. Accordingly, defendant's existing sentence is lawful, and he is not entitled to a remand for resentencing under the Act's provisions." (*Cruz, supra*, 207 Cal.App.4th at p. 680; *Lynch, supra*, __ Cal.App.4th at p. __ [2012 DAR at pp. 12946-12947; see *People v. Brown* (2012) 54 Cal.4th 314, 328-330 [no equal protective violation in prospective application of statutory grant of additional conduct credits]; *People v. Floyd* (2003) 31 Cal.4th 179, 188-191 [prospective application of Proposition 36, the Substance Abuse and Crime Preventions Act of 2000, did not violate equal protection].)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.